93-375
No.

Supreme Court, U.S.
FILED
SEP 7 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LOUISIANA JOHNSON OWENS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSEPH F. WALSH
Counsel of Record

316 West Second Street
Suite 1200
Los Angeles, California 90012
(213) 893-7500

Attorney for Petitioner
LOUISIANA JOHNSON OWENS

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

QUESTION PRESENTED

1. Whether Petitioner's due process rights were violated within the meaning of *Doyle v. Ohio*, 426 U.S. 610 (1976) when the Assistant United States Attorney commented on Petitioner's failure to identify Reginald Roberts and Jerome Williams at Petitioner's arraignment?

2. Whether Petitioner was denied her constitutional right to cross-examine Reginald Roberts concerning his prior juvenile convictions?

3. Whether Petitioner's due process rights were violated by the trial court's refusal to suppress eyewitness identification testimony where the identification at issue was the identification of a third party and not the defendant in a criminal case?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

PARTIES TO THE PROCEEDING 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE FACTS 2

REASONS FOR GRANTING WRIT 4

I Petitioner's Due Process Right Were Violated Within The Meaning Of *Doyle v. Ohio*, 426 U.S. 610 (1976) When The Assistant United States Attorney Commented On Petitioner's Failure to Identify Reginald Roberts And Jerome Williams At Petitioner's Arraignment. 4

II The Appellant Was Denied Her Constitutional Right To Cross-Examine Reginald Roberts Concerning His Prior Juvenile Convictions. 7

TABLE OF CONTENTS
Continued

Page

III Petitioner's Due Process Rights Were Violated By The Trial Court's Refusal To Suppress Eyewitness Identification Testimony Where The Identification At Issue Was The Identification Of A Third Party And Not The Defendant In A Criminal Case. 9

CONCLUSION 11

APPENDIX A

Memorandum Opinion, U.S. Court of Appeals for the Ninth Circuit, Filed July 7, 1993 . . . . . A-1

APPENDIX B

Judgment, U.S. District Court for the Central District of California, Filed December 3, 1991 . . . . . B-1

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Charles, 447 U.S. 404 (1980) 7

Chipman v. Mercer, 628 F.2d 528 8

Davis v. Alaska, 415 U.S. 308, 315 (1974) 7

Delaware v. Van Arsdall, 475 U.S. 673 (1986) ... 8

Douglas v. Alabama, 380 U.S. 415, 418 (1965) ... 7

Doyle v. Ohio, 426 U.S. 610 (1976) 4, 6

Fletcher v. Weir, 455 U.S. 603 (1982) 7

Greer v. Miller, 97 L.Ed.2d 618, 628 (1987) 5-7

Jenkins v. Anderson, 447 U.S. 231 (1980) 7

Manson v. Brathwaite, 432 U.S. 98 (1977) 10

Neil v. Biggers, 409 U.S. 188, 199 (1972) 10

Pointer v. Texas, 380 U.S. 400 (1965) 7

Simmons v. United States, 390 U.S. 377, 384 (1968) 10

South Dakota v. Neville, 459 U.S. 553 (1983) 7

Stovall v. Denno, 388 U.S. 293, 301-302 (1967) 9, 10

United States v. Hale, 422 U.S. 171 (1975) 7

Wainwright v. Greenfield, 88 L.Ed.2d 623 (1986) 5, 6

Statutes

Federal Rules 609(d) 3, 7, 8

No. _____

In The—
SUPREME COURT OF THE UNITED STATES
October Term, 1993

LOUISIANA JOHNSON OWENS
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Court of Appeals is attached hereto as Appendix A. The judgment of the United States District Court is attached hereto as Appendix B.

PARTIES TO THE PROCEEDING

All parties to this proceeding are the parties shown in the caption of the case, *Louisiana Johnson Owens vs. United States of America*.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 and Rule 13 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in pertinent part: "No person shall...be deprived of life, liberty or property, without due process of law..."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

STATEMENT OF THE FACTS

The Petitioner, Louisiana Johnson Owens was convicted after a jury trial of conspiracy to commit a postal robbery, in violation of 18 U.S.C. § 371 and 2114; postal robbery, in violation of 18 U.S.C. § 2114; and use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). Petitioner was sentenced to 130 months in custody. The convictions were affirmed by the United States Court of Appeals for the Ninth Circuit.

Petitioner Owens, formerly a postal worker at the North Hollywood Post Office, is accused of hiring two men to rob it. According to the testimony of government witnesses, Roberts and Williams, Owens met with her accomplices several times to plan the robbery. She provided a tour of the facility , keys to gain access, and instructed the two to carry a gun. On February 4, 1991, Robert and Williams robbed the North Hollywood branch, seizing over $25,000. The Government claimed that Owens assisted them by appearing to be a hostage and by tying up the other employees under orders from the gunmen.

Approximately a week before the robbery, Arnulfo Garcia, a relief clerk assigned to the branch, saw a young black man and a middle-aged black woman

talking inside the post office. Three months later an agent showed Garcia photographs of three black men. One of the photos resembled Roberts. Garcia testified that the photo of Roberts "best described" the man he saw. Petitioner unsuccessfully moved to strike the evidence.

Owens testified that she did not plan or assist in the robbery. She knew Roberts and Williams only as the friends of her son. She recalled that one afternoon before the robbery Roberts and Williams were waiting for her son to return home while she was talking on the telephone with a friend about the general conditions of work, including the lack of building security. After the conversation ended, they briefly questioned her about previous robberies. She also testified that she made a general practice of leaving her purse (containing her keys to the post office) on the kitchen counter top, making the keys accessible to anyone who entered the home.

In the course of cross-examining Owens, the prosecutor enquired into her failure to identify her coconspirators at arraignment. Owens acknowledged that she recognized Roberts and Williams but did not bring this to the attention of the police because she was never asked. The judge sustained Petitioner's objection and issued two curative instructions. The court denied Petitioner's motion for a mistrial.

Petitioner, under Fed. R. Evid. 609(d), sought to introduce evidence of Robert's prior juvenile convictions. These included snatching a purse form an eight-month pregnant woman and making off with her car (charged of robbery and vehicle theft, respectively). The district court denied the request.

REASONS FOR GRANTING WRIT

I

Petitioner's Due Process Right Were Violated Within The Meaning Of *Doyle v. Ohio*, 426 U.S. 610 (1976) When The Assistant United States Attorney Commented On Petitioner's Failure to Identify Reginald Roberts And Jerome Williams At Petitioner's Arraignment.

During the cross-examination of the Petitioner during the trial, the prosecutor elicited the fact that Petitioner recognized Roberts and Williams, as persons that she knew, and did not say anything to anyone at the arraignment about this fact. (2 R.T. 170). Defense counsel moved for a mistrial. However the defense motion for a mistrial was denied. (2 R.T. 170) The question and the answer were stricken by the District Court and the jury was admonished to disregard the entire series of questions. (2 R.T. 172) Petitioner urges the Court to grant the certiorari in this case on the grounds that the questioning by the prosecutor constituted an improper comment on her post-arrest silence, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the defendants had taken the witness stand and offered an exculpatory explanation for their participation in what the state's evidence had portrayed as a routine marijuana transaction. On cross-examination, the prosecutor impeached their testimony by asking them why they had not explained their conduct at the time of their arrest. The Court held that such cross-examination was

fundamentally unfair and therefore violated the due process clause of the Fourteenth Amendment.

The source of the unfairness was the implicit assurance contained in the *Miranda* warnings "that silence will carry no penalty." In *Doyle v. Ohio*, *supra*, the Court stated:

> "Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (426 U.S. at 618-619.)

The *Doyle* case was reaffirmed in *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) where the Court held that a prosecutor's argument using the defendant's post-*Miranda* warnings silence as evidence of sanity was held to be a violation of the defendant's right to due process of law. In the *Wainwright* case, the Court noted that *Doyle* rests on the "fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." (*Id.* at 630.) The Court also noted that "*Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the due process clause requires." (*Id.* at 630.)

The United States Supreme Court in *Greer v. Miller*, 483 U.S. 756 (1987), also reaffirmed its earlier decision

in *Doyle v. Ohio*, 426 U.S. 610 (1976). In the *Greer* case, a prosecutor on cross-examination asked the defendant why the defendant did not tell his story to anyone when he was arrested. The record indicated that right after his arrest, the defendant was given his *Miranda* warnings. Greer's defense counsel immediately objected and the trial judge, although denying a motion for mistrial, sustained the objection and instructed the jury to ignore the question by the prosecutor concerning the defendant's post-arrest silence after receiving *Miranda* warnings.

In *Greer*, the Court held that no *Doyle* violation occurred because the jury was instructed to disregard the question at the time of the objection and later the judge instructed the jurors at the close of the case to disregard questions to which objections were sustained. The Court noted that no further questioning or argument with respect to the defendant's post-arrest silence occurred.

Nevertheless, in *Greer v. Miller*, *supra*, the Court reaffirmed the holding in *Doyle v. Ohio*, 426 U.S. 610 (1976) that "The use for impeachment purposes of petitioner's silence, at the time of arrest, and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Greer v. Miller*, 483 U.S. 756 (1987). The Court noted that post-arrest silence may not be particularly probative of guilt. It was also again noted that *Miranda* warnings contained an implicit assurance "that silence will carry no penalty." (*Id.*)

Thus, it was stated that "*Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284,

291 (1986); *Greer v. Miller*, *supra*, at 628-629; see also, *United States v. Hale*, 422 U.S. 171 (1975); *South Dakota v. Neville*, 459 U.S. 553 (1983); *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Anderson v. Charles*, 447 U.S. 404 (1980).

II

The Appellant Was Denied Her Constitutional Right To Cross-Examine Reginald Roberts Concerning His Prior Juvenile Convictions.

Prior to trial, counsel for Petitioner advised the Court that he intended to impeach prosecution witness Reginald Roberts with two prior juvenile convictions. The convictions were for purse snatching, which was charged as a robbery, and vehicle theft. Counsel for Petitioner noted that such prior juvenile court convictions are admissible to impeach witnesses pursuant to Federal Rules 609(d) (1 R.T. 4-6) The District Court ruled that Appellant could not cross-examine Reginald Roberts concerning the prior juvenile convictions. (1 R.T. 7.) The Petitioner urges the court to grant certiorari in order to review whether this ruling violated the Petitioner's Constitutional right to confront and cross examine the witnesses against her.

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Pointer v. Texas*, 380 U.S. 400 (1965). The primary interest protected by the confrontation clause is the right of cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "This right to confrontation is embodied substantially by the

right to cross-examine adverse witnesses." *Chipman v. Mercer*, 628 F.2d 528, 530 (9th Cir. 1980).

More recently in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Supreme Court again reemphasized that an accused is constitutionally entitled to cross-examine prosecution witnesses in order to explore potential bias. The Court in *Van Arsdall* stated that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ...could appropriately draw inference relating to the reliability of the witness.'" *Delaware v. Van Arsdall, supra*, at 680.

In criminal proceedings, Federal Rules of Evidence, Rule 609 (d) allows evidence of a juvenile adjudication of a witness other than the defendant, if the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. Rule 609(d) provides the following:

> "Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt of innocence."

The government's case against the Petitioner was based entirely on the credibility of James Williams and

Reginald Roberts. Any evidence which impeached the credibility of Williams and Roberts was critical to the defense. The exclusion of this impeachment evidence violated Petitioner's right to confront and cross examine her accusers and deprived her of a fair trial.

III

Petitioner's Due Process Rights Were Violated By The Trial Court's Refusal To Suppress Eyewitness Identification Testimony Where The Identification At Issue Was The Identification Of A Third Party And Not The Defendant In A Criminal Case.

The government attempted to establish that one week prior to the robbery of the post office, Petitioner was seen speaking to Reginald Roberts at the post office. This was an important fact because Reginald Roberts claimed that such a meeting took place in order to plan the robbery with Petitioner. Robert's testimony on this point, however, was suspect because he actually committed the robbery and he was testifying against Petitioner in exchange for government assistance in receiving a lighter sentence.

To corroborate Roberts, the government called Arnulfo Garcia as a witness to testify that he saw a woman who looked like Petitioner talking to a man who looked like Roberts at the post office one week prior to the robbery. Because Arnulfo Garcia made his identification of Roberts from a suggestive photographic showup three weeks after the robbery, Petitioner moved to strike his identification testimony as being in violation of due process under *Stovall v. Denno*, 388 U.S. 293

(1967). The motion was denied by the trial court. The Ninth Circuit affirmed and stated this Court's opinion in *Stovall* did not apply to identifications of the accused. Petitioner urges the Court to grant certiorari on this issue and extend the *Stovall* line of authority to any impermissibly suggestive identification made in a criminal case.

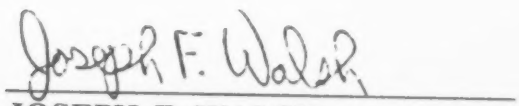
Under *Stovall v. Denno*, 388 U.S. 293, 301-302 (1967), the court must suppress eyewitness identification testimony when the pre-trial confrontation between the eyewitness and the accused is "so unnecessarily suggestive that [the accused is] denied due process of law." In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Supreme Court stated that "each case must be considered on its own facts, and that convictions based on eyewitness identification by photograph will be set be aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In evaluating a claim under the *Simmons* and *Stovall* cases, the Courts must consider "[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*,409 U.S. 188, 199 (1972). See also, *Manson v. Brathwaite*, 432 U.S. 98 (1977). The due process principles in these cases apply equally to third party identifications, such as the identification in this case. To the extent that an improper identification contributes to a conviction, it violates due process.

CONCLUSION

Based upon the foregoing, Petitioner urges that this writ be granted.

Respectfully submitted,



JOSEPH F. WALSH
Attorney for Petitioner
LOUISIANA JOHNSON OWENS